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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

O'CONNELL MACHINERY COMPANY, INC.,

Petitioner,

against

M.V. "AMERICANA", her engines, boilers, tackle, etc.
and ITALIA DI NAVIGAZIONE S.p.A.
(d/b/a ITALIAN LINE),

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented for Review

1. Is the decision of the Court below, that Congress is free to reduce Article III's substantive *in rem* right of arrest in Admiralty, in conflict with this Court's holding in *Panama Railroad Co.* v. *Johnson,* 264 U.S. 375 (1924)?

2. Did the Court below err in its determination that no substantive *in rem* rights of arrest in Admiralty for commercial ships owned by foreign sovereigns preexisted the Constitution?

3. Is *The Pesaro,* 271 U.S. 562 (1926) still viable law after its precedents have been overturned?

4. Is the Foreign Sovereign Immunity Act (FSIA) 28 USC §1605(b) unconstitutional insofar as it eliminates substantive *in rem* rights? [28 USC §2403(a) may be applicable.]

5. Did the Court below err in its determination that an indirectly owned subsidiary may qualify as an instrumentality of a foreign state under the FSIA, 28 USC §1603(b)(2)?

6. Did the Court below err in its interpretation of the Treaty of Friendship, Commerce, and Navigation Between the United States of America and the Italian Republic [1949], 63 Stat. 2255, T.I.A.S. #1965, 79 UNTS 171 that no waiver of arrest of property required under FSIA 28 USC §1609 existed?

Note: The parties named in the Caption are the same parties that appeared below, with the exception of the United States of America, which appeared as an intervenor at the Second Circuit.

Petitioner, pursuant to Rule 28.1, reports it has no parent, less than wholly-owned subsidiary, or affiliated company.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner O'CONNELL MACHINERY COMPANY, INC., prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit entered in this matter.

Opinions Below

Petitioner seeks review of the opinion rendered in *O'Connell Machinery Company, Inc.* v. *M.V. Americana and Italia Di Navigazione S.p.A. (d/b/a Italian Line)*, 734 F.2d 115 (2 Cir. 1984) (p. 2a) rehear'g den. ____ F. 2d ____ (June 14, 1984) (p. 1a), affirming 566 F. Supp 1381 (SDNY 1983) (p. 8a).

Jurisdictional Grounds

The opinions and judgment of the Second Circuit were decided and entered on May 4th, 1984. A timely petition for a rehearing and suggestion for a hearing *in banc* was denied and entered on June 14, 1984.

Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. §1254(1). Appeal was taken below under 28 U.S.C. §1291 in that that order of the District Court dismissing the *in rem* claim (but not the *in personam* claim) was "a final disposition of a claimed right which is not an ingredient of the cause of action" in conformance with *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546-7 (1949). See also *Swift & Co.* v. *Compania Caribe*, 339 U.S. 684, 688-9 (1950); *The Pesaro*, 255 U.S. 216, 217 (1921); *Seaboard & Caribbean*

Transport Corp. v. *Hafen-Dampfschiffahrt A.G.*, 329 F. 2d 538, 540 (5 Cir. 1964).

Constitutional Provisions, Treaties and Statutes

1. The United States Constitution, Article III, Sec. 2, Clause 1, in pertinent part:

> "The Judicial Power shall extend . . . to all cases of admiralty and maritime jurisdiction."

2. The Treaty of Friendship, Commerce and Navigation Between the United States of America and the Italian Republic[1] of February 2, 1948 [1949] 63 Stat. 2255, T.I.A.S. #1965, 79 UNTS 171 — Article XXIV (6):

> "6. No enterprise of either High Contracting Party which is publicly owned or controlled shall, if it engages in commercial, manufacturing, processing, shipping or other business activities within the territories of the other High Contracting Party, claim or enjoy, either for itself or for its property, immunity therein from taxation, from suit, from execution of judgment, or from any other liability to which a privately owned and controlled enterprise is subject therein."

3. The Foreign Sovereign Immunity Act[2] (FSIA),

a. 28 USC §1603

> "For purposes of this chapter—(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

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[1]For other sections see p. 23a.

[2]For full text of the FSIA see p. 27a.

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country."

b. 28 USC §1605(b)

"(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state:

PROVIDED, That—

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; but such notice shall not be deemed to have been delivered, nor may it thereafter be delivered, if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit—unless the party was unaware that the vessel or cargo of a foreign state was involved, in which event the service of process of arrest shall be deemed to constitute valid delivery of such notice; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is ini-

tiated within ten days either of the delivery of notice as provided in subsection (b) (1) of this section or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

Whenever notice is delivered under subsection (b) (1) of this section, the maritime lien shall thereafter be deemed to be an *in personam* claim against the foreign state which at that time owns the vessel or cargo involved: PROVIDED, That a court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose, such value to be determined as of the time notice is served under subsection (b)(1) of this section."

c. 28 USC §1609

"Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter."

d. 28 USC §1610(d)

"(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if—

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction."

Statement of the Case

The cause of action arose from the damage caused to petitioner's large piece of machinery, called a gear generator, which was occasioned during September of 1981 on board the M.V. AMERICANA while at sea. The owner of the M.V. AMERICANA and the issuer of the liner bill of lading was ITALIA DI NAVIGAZIONE, S.p.A. (doing business as Italian Line). Suit was filed on September 23rd, 1982 in the United States District Court for the Southern District of New York for petitioner and against the M.V. AMERICANA, her engines, boilers, tackle, etc., *in rem*, and Italia *in personam* under the subject matter jurisdiction of Article III, Sec. 2, Cl.1 of the United States Constitution, and 28 USC §1333(1).

Personal service of the complaint was made on Italia by conventional means through its New York agents, also on September 23rd, 1982. When it was determined that the M.V. AMERICANA would be arriving in New York on or about October 3rd, 1982 (later adjusted to October 6th), Italia was, as per custom and practice, provided the opportunity to supply a P & I Club letter of guarantee[3] in lieu of the actual arrest *in rem* of the M.V. AMERICANA.

Italia refused to provide such a letter claiming that the M.V. AMERICANA was entitled to the protection of the FSIA. This was followed by telephone calls and letters from two different

[3]A P & I Club (i.e. Protection & Indemnity Club—a form of mutual insurance for vessels) letter guarantees an appearance on behalf of the vessel, the *in rem* defendant, and security for the claim. See Buglass, *Marine Insurance and General Average in the United States*, 2ed 1981, p. 411-3.

law firms claiming to represent Itaila. An Answer to the *in personam* complaint was then made on behalf of Italia immediately thereafter. This answer did not invoke the FSIA in any of its defenses, nor did it challenge service of the *in personam* complaint as not being in conformance with the requirements for service under FSIA 28 USC § 1608 (which it was not), thereby waiving any claim of sovereign immunity.

Petitioner then brought on an Order to Show Cause to determine Italia's rights to invoke the FSIA. The District Court denied that application as premature without an actual arrest having been made (p. 21a). Thereafter the Court of Appeals for the Second Circuit was petitioned for a Writ of Mandamus, which was denied, 714 F.2d 116 (2 Cir. 1982) (p. 20a).

Petitioner was then confronted with three choices which were (a) abandoning its substantive *in rem* rights against the vessel, (b) proceeding under FSIA §1605(b)(1) which would convert the substantive *in rem* right against the vessel to an *in personam* action against Italia—which was redundant since it was already available in the *in personam* side of the action,[4] or (c) asserting its substantive *in rem* rights by proceeding under Supplemental Rule C for Certain Admiralty and Maritime Claims, and contesting Italia's assertion of the FSIA. There being no reasonable choice other than to contest Italia's assertion of the FSIA, petitioner notified Italia's attorneys of its intentions and provided them the opportunity to supply a P & I Club Letter of Guarantee which was agreed upon, saving considerable expense and inconvenience to the parties and the Court.

Italia then moved to dismiss the entire complaint under FSIA 28 USC §1605(b)(1). The District granted the motion to dismiss as to the *in rem* action, but denied it as to the *in personam* action, 566 F. Supp. 1381 (SDNY 1983) (p. 8a). An appeal was taken to the Second Circuit. Pursuant to 28 USC §2403(a)

[4]This distinction between *in rem* and *in personam* is set forth with clarity in *Belcher Co. of Alabama, Inc.* v. *M/V MARATHA MARINER*, 724 F.2d 1161, 1163-4 (5 Cir. 1984).

it was certified to the Attorney General that the constitutionality of 28 USC §1605(b) was drawn in question, which resulted in the United States being added as an intervenor. The District Court's opinion was affirmed, 734 F2d 115 (2 Cir. 1984) (p. 2a), and the petition for a rehearing with a suggestion for a hearing *in banc* was denied, ____ F.2d ____ (2 Cir., June 14, 1984) (p. 1a).

The Writ Should Be Granted for the Following Reasons:

1. The Decision of the Second Circuit seriously conflicts with the decisions of this Court.

(a) The Second Circuit held that substantive maritime rights which existed when the Constitution was adopted are not inviolate, thus the Congress could eliminate this class of *in rem* actions (p. 6a-7a).

Such a holding irreconcilably conflicts with the following decisions of this Court:

(1) *Detroit Trust Co.* v. *The Thomas Barlum*, 293 U.S. 21 (1934).

The Second Circuit quoted from a portion of this decision which states:

> "When the Constitution was adopted, the existing maritime law became the law of the United States 'subject to power in Congress to modify or supplement it as experience or changing conditions might require.' " 293 U.S. at 43.

Overlooked was the limitations subsequently expressed on the next page which states:

> "*But* in amending and revising the maritime law, the Congress necessarily acts within *a sphere restricted by the concept of the admiralty and maritime jurisdiction.* 293 U.S. at 44 (emphasis added).

(2) *Panama R.R. Co.* v. *Johnson*, 264 U.S. 375 (1924).

The Second Circuit cites this decision through its reference to the *Detroit Trust* case, but does not directly quote from it. The limitation upon Congress is more clearly expressed in this decision:

> "After the Constitution went into effect, the substantive law theretofore in force was not regarded as superseded or as being only the law of the several States, but as having become the law of the United States—*subject to power in Congress to alter, qualify or supplement it as experience or changing conditions might require*. When all is considered, therefore, there is no room to doubt that the power of Congress extends to the entire subject and permits of the exercise of a wide discretion. *But there are limitations* which have come to be well recognized. One is that *there are boundaries to the maritime law and admiralty jurisdiction which inher in those subjects and cannot be altered by legislation, as by excluding a thing falling clearly within them* or including a thing falling clearly without." 264 U.S. at 386 (emphasis added).

The decision below would effectively eliminate any limitation upon Congress, thus it cannot be allowed to stand. To fail to act would not merely alter the substantive[5] *in rem* action, it would exclude it from the admiralty jurisdiction—which Congress can not do. Indeed, when the Federal Rules of Civil Procedure were unified in 1967, recognition of such a restraint was evidenced by the need for the Supplemental Rules for Certain Admiralty and Maritime Claims (See Currie, *Unification of the Civil and Admiralty Rules: Why and How*, U. of Maine L. Rev. 1965).

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[5]Recognition of the substantive nature of the *in rem* action may be found in *Amstar Corp.* v. *S/S ALEXANDROS T*, 664 F. 2d 904, 908-9 (4 Cir. 1981) and *Merchants National Bank of Mobile* v. *Dredge General G.L. Gillespie*, 663 F.2d 1338, 1350 (5 Cir. 1981), *cert. dismissed* 456 U.S. 966 (1982). Far from being an anachronism, *in rem* arrest has been growing in acceptance internationally.

All of the cases that have been before this Court concerning changes in the maritime law, with the exception of *Panama R.R. Co.* v. *Johnson, supra,* have concerned expansion of the jurisdiction. *Panama R.R. Co.* v. *Johnson, supra,* is the only case, prior to this matter, to come before this Court concerning the elimination of a substantive right. In that case the claim was made that the Jones Act, 46 USC §688, was unconstitutional because it took away the substantive right to sue in Admiralty without a jury, and replaced it with a civil action before a jury. Noting this claim, it was held:

> "It must be conceded that the construction thus sought to be put on the statute finds support in some of its words, and also *that if it be so construed a grave question will arise respecting its constitutional validity.*" 264 U.S. 389 (emphasis added).

The constitutional conflict was avoided by permitting both actions to exist as an election of remedies by holding:

> "It therefore is reasonable to believe that, had Congress intended by this statute to withdraw rights of action founded on the new rules from the admiralty jurisdiction and to make the cognizable only on the commonlaw side of the Courts, it would have expressed that intention in terms befitting such a pronounced departure—that is to say, in terms *unmistakably manifesting a purpose to make the resort to common-law remedies compulsory, and not merely permissible.*"

A complete examination of the FSIA, 28 USC §1602 through 1611 (p. 27a-37a) displays no such compulsory application of the FSIA, except in those class of cases that need to invoke the FSIA to obtain jurisdiction. Thus, there is no reason why existing substantive maritime rights can not be preserved with the FSIA as an election of remedies.

Such a solution would avoid the developing problem with *in rem* arrest (see Roberts & Warren, *The Foreign Sovereign Immu-*

nities Act: Where Did Our Remedies Go? The Maritime Lawyer, Vol. III, No. 2, p. 155, Oct. 1978; Yiannopoulos, *Foreign Sovereign Immunity and the Arrest of State-Owned Ships: The Need for an Admiralty Foreign Immunity Act,* 57 Tulane L.R. 1274, 1983), and would put us in step with the international community, where arrest of state-owned ships engaged in commercial activities routinely occurs (See the International Convention for the Unification of Certain Rules Relating to the Immunity of State-Owned Vessels[6]—Brussels 1926, 176 LNTS 199, 6 A *Benedict on Admiralty* p. 8-33, 7th ed, 1983; the International Convention Relating to the Arrest of Sea-going Ships—Brussels 1952, 439 UNTS 193, 6A *Benedict on Admiralty,* p. 8-21, 7th ed., 1983; and The English State Immunity Act[7] 1978, 6A *Benedict on Admiralty,* p. 8-72, 7th ed., 1983).

(b) The Second Circuit held that when the Constitution was adopted there was no substantive right *in rem* against state-owned ships in commerce (p. 6a).

The first Supreme Court case involving sovereign immunity and a ship was *The Schooner Exchange* v. *M'Fadden,* 2 U.S. (7 Cranch) 116 (1812) and that case provided no guidance regarding merchant ships, since it only involved a warship. The first occasion this Court had to consider sovereign immunity in the commercial context was in *Bank of the U.S.* v. *Planter's Bank of Georgia,* 23 U.S. (9 Wheat) 904 (1824) wherein it was held:

> "It is, we think, *a sound principle, that when a government becomes a partner in any trading company, it devests itself,* so far as concerns the transactions of that company, *of its sovereign character, and take that of a private citizen.*" 23 U.S. at 900 (emphasis added).

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[6]Italy is a signatory to this convention.

[7]England's FSIA expressly provides for arrest in commercial cases such as this, and carefully distinguishes that class of cases which must use arrest or attachment to establish the threshold of jurisdiction (section 10(2)(a)), thereby avoiding the friction which prompted our FSIA.

Mr. Justice Story expressed a similar view on the Circuit in *U.S.* v. *Wilder*, 28 Fed. Cas. 601, No. 16,694 (CCDMa 1838):

> "It has been laid down by Vattel (book 2, §213) that the promises, the conventions, and all the *private obligations of the sovereign are naturally subject to the same rules as those of private persons.*" 28 Fed. Cas. at 604 (emphasis added).

This was parallel to the English view as put forth in *The Charkieh* (1873) L.R. 4 A&E 59:

> "No principle of international law, and no decided case, and no dictum of jurists of which I am aware, has gone so far as to authorize a sovereign prince to assume the character of a trader, when it is for his benefit . . ."

The Circuit Court for New York in *The Fidelity*, 8 Fed. Cas. 1189 at 1191-2, No. 4758 (CC, SDNY 1879) determined that government vessels not devoted to public use were subject to liens.

Thus the assertion by the Court below that there were no pre-existing *in rem* rights against state-owned merchant ships since foreign governments played little or no role in the merchant marine when the Constitution was adopted, is in conflict with this Court's views of a sovereign's commercial activities as expressed in *Bank of U.S., supra,* and can not be sustained.

It was not until 1926 that the view was adopted that merchant ships in public commerce enjoyed immunity. *The Pesaro*, 271 U.S. 562 (1926). Contrary to the holding by the Second Circuit, *The Pesaro, supra,* does not state that at the time the Constitution was adopted there was no right to arrest state-owned merchant ships, it merely states that the law was unsettled (without discussing or distinguishing *Bank of U.S., supra*) so it looked to English law for guidance and thus relied upon *The Parlement Belge*, (1880) L.R. 5P.D. 197 and *The Porto Alexandre*, [1919] 1 Lloyd's L. Rep. 191.

The decision in *The Pesaro, supra,* has been called "one of the most unfortunate decisions ever made by the Supreme Court." Sanborn, *The Immunity of Government Owned Vessels,* 39 Am. J. Int'l Law 794 (1945). Mr. Justice Frankfurter was less than complementary to the decision when he observed:

> "The Department of State . . . should no longer be embarrassed by having the decision in *The Pesaro* remain unquestioned . . ."

Mexico v. *Hoffman,* 324 U.S. 30 at 40 (1945).

However, it was not until 1976 that *The Pesaro* was questioned. It was not questioned in our courts, but rather by England's House of Lords, Privy Council in *The Philippine Admiral,* [1976] 1 Lloyd's L. Rep. 234, 2 W.L.R. 214. The history of sovereign immunity for vessels was traced with great detail through both English and American case law (1 L.L. Rep. at 240-6) and the conclusion was reached that the decision in *The Parlement Belge, supra,* had been wrongly extended to merchant ships not only in *The Porto Alexandre, supra,* but *The Pesaro. The Philippine Admiral, supra,* was adopted and expanded upon by the House of Lords in *The "I Congreso Del Partido"* [1981] 2 Lloyd's L. Rep. 367, 372. The foundation for *The Pesaro, supra,* has been entirely removed, leaving no basis in law for its holding, and proving the criticism of the case to be justified.

Accordingly, the Second Circuit's reliance upon *The Pesaro, supra,* is misplaced and in conflict with the viable cases of this Court. Since this Court has not been hesitant to overturn maritime precedent when it was demonstrated that the English Law upon which it rested had been subsequently rejected (*U.S.* v. *Reliable Transfer Co., Inc.,* 421 U.S. 397 (1975); *Moragne* v. *States Marine Lines, Inc.,* 398 U.S. 375 (1970)), there can be no reason to avoid overturning precedent which has had the English Law upon which it rested not only rejected, but overturned.

2. The decision below involves crucial questions under the Foreign Sovereign Immunity Act that must be settled by this Court.

(a) The Second Circuit held that the requirements of FSIA Section 1603 defining a "foreign state" were met notwithstanding the fact that the ownership interest of the state went through three layers of companies (p. 4a).

There is no dispute that the ship was owned by Italia di Navigazione S.p.A. (an Italian corporate form) which was primarily owned by Societa[8] Finanziaria Maritima (FINMARE) which, in turn, was owned by the Instituto per la Ricostruzione Industriale[9] (IRI), and which is finally owned by the Republic of Italy. What is in dispute, and what needs to be addressed by this Court is just how broadly the definition of a foreign state can be applied.

Notwithstanding the fact that FSIA 28 USC §1603(b)(2) restricts application of the definition to an "agency or instrumentality . . . which is *an organ* of a foreign state or political subdivision thereof *or a majority of whose shares* or other ownership interest *is owned by a foreign state* or political subdivision, thereof . . .", the Court below side-stepped the definition by characterizing these multilayered companies as double-tiered administrative agencies and political subdivisions.

Not even the most liberal application of the definitions could permit FINMARE or Italia to be considered as political subdivisions or administrative agencies. No mention is made in the definition for subsidiaries of subsidiaries to be covered by the

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[8]Societa (or its English equivalent, Society) is the same as Company or Association, *Black's Law Dictionary*, 5 ed., 1979, p. 1247.

[9]FINMARE is one of seventeen subsidiary companies of IRI, others being Banco di Roma, Alitalia, etc. as shown by a recent advertisement in *Forbes* (Dec. 19, 1982). According to an article in *Forbes* for May 7, 1984, IRI planned to *sell* some of the unprofitable companies in this group.

FSIA. To have Italia covered by the FSIA it must *either* be an organ or political subdivision of the state *or* be owned in majority by the state. There is simply no wording in §1603 to permit any further layer of companies to be covered by the FSIA. The effect of permitting this layering to be ignored is to allow Italy to ignore the corporate forms that isolate Italy from liability—an effect that this Court has refused to permit in the past. *Schenley Corp.* v. *U.S.* 326 U.S. 432, 437 (1946).

The Court below's holding that political subdivisions were intended to include all governmental units beneath the central government can, by no stretch of the imagination, be said to apply to companies, particularly in view of the definition of political subdivision as found in *Black's Law Dictionary,* 5 ed., 1979, p. 1043, to wit:

> "A division of the state made by proper authorities thereof, acting within their constitutional powers, *for purpose of carrying out a portion of those functions of state* which by *long usage* and *inherent necessities of government have always been regarded as public.*" (emphasis added)

This Court has considered stock companies owned by the United States to be separate entities, rather than political or administrative subdivisions in *U.S.* v. *Strang,* 254 U.S. 491 (1921). See also *Coale* v. *Societe Cooperative Suisse,* 21 F.2d 180 (SDNY 1921). If the law had been otherwise, there would be no reason to mention majority ownership of shares in the definition. No proof of any kind was ever offered at the District Court to support such a holding—in fact the assertions of political subdivision or governmental units were not made until the appeal to the Second Circuit, and only by way of argument. It would be a true miscarriage of justice to adopt such labels without petitioner ever having been afforded the opportunity for any discovery on this issue, particularly since the burden of proof is on the party seeking benefit of the FSIA. See (1976) U.S. Code Cong. & Ad. News, p. 6616; *Outbound Maritime Corp.* v. *P.T.*

Indonesian Consortium, 575 F. Supp. 1222, 1224 (SDNY 1983).

(b) The Second Circuit did not address the point raised by petitioner regarding waiver of arrest of property under the applicable treaty.

The issue presented to the Court below concerned petitioner's reliance on the Treaty of Friendship, Commerce, and Navigation Between the United States of America and the Italian Republic of February 2, 1948, [1949] 63 STAT. 2255, T.I.A.S. #1965, 79 UNTS 171, Article XXIV(6), which in pertinent part provides:

> "No enterprise . . . shall, if it engages in . . . shipping . . . claim or enjoy . . . for its property, immunity therein . . . from suit . . ."

Since a suit against property is typically an *in rem* action, whether that property is land or ships, and the only way to secure service for an *in rem* suit is by arrest (or consent), the treaty's waiver of suits against property is sufficient to meet the requirements for waiver under 28 USC § 1609 and § 1610(d).

This point was ignored by the Second Circuit (p. 6a), which addressed itself to a point not raised on appeal—and in fact was disclaimed in a letter brief of April 19th, 1984 to the Court. The point disclaimed concerned the phrase "or any other liability" which is part of Article XXIV (6). This phrase had been in issue in another case before the Second Circuit — *S & S Machinery Co.* v. *Masinexportimport*, 706 F. 2d 411 (2 Cir. 1983), *cert. denied*, ____ U.S. ____, 104 S. Ct. 161, 78 L.Ed. 2d 147 (1983) wherein that plaintiff attempted to have the words "or any other liability" read broadly to incorporate a civil attachment under New York law (which is a procedural device subject to the Judge's discretion as contrasted with the substantive *right* of *in rem* arrest). There was no issue concerning suits against property in the *S & S Machinery case*.

Since Italy, according to the Tate Letter, 26 Dept. State Bull. 984 [1952], 425 US 711-716, does not afford immunity to government-owned merchant ships in its own courts (425 US at 713), and is a signatory to the Brussels Convention of 1926 waiving immunity from arrest in other Courts, no injustice or insult is done by considering waiver of immunity of suits against property under the Treaty of FCN to be a waiver of arrest under FSIA. After all the focus of FSIA § 1609 is:

> "*Subject to existing* international agreements. . . . the *property* in the United States of a foreign state shall be immune from attachment *arrest and execution* . . ." (emphasis added)

The fact that Italia raised no defense under the FSIA in its Answer to the Complaint, and proceeded in the action, is consistent with the waiver of immunity under the FCN. Italia can not selectively use its immunity. *People of Puerto Rico* v. *Ramos*, 232 U.S. 627, 632 (1914). Immunity of the sovereign must be regarded as being waived when the litigation is entered with a general appearance. *Sao Vincent*, 281 Fed. 111, 114 (2 Cir. 1922).

Conclusion

The issues raised in this petition deserve the attention of this Court, since they are certain to be before this Court many times until they are addressed. For this and the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Of Counsel

Order Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
83-7673

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 14th day of June one thousand nine hundred and eighty-four.

O'CONNELL MACHINERY COMPANY, INC.,
Plaintiff-Appellant,

v.

M.V. "AMERICANA" and ITALIA DI NAVIGAZIONE, S.p.A. (d/b/a ITALIAN LINE),
Defendants-Appellees,

UNITED STATES OF AMERICA,
Intervenor.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiff-appellant, O'Connell Machinery Company, Inc.,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

Filed
June 14, 1984
Elaine B. Goldsmith, Clerk

Elaine B. Goldsmith
Clerk

Opinion of Court of Appeals

O'CONNELL MACHINERY COMPANY, INC.,

Plaintiff-Appellant,

v.

M.V. "AMERICANA" and ITALIA DI NAVIGAZIONE, S.p.A. (d/b/a ITALIAN LINE),

Defendants-Appellees,

UNITED STATES OF AMERICA,

Intervenor.

Cal. No. 499, Docket 83-7673.

United States Court of Appeals,
Second Circuit.

Argued Jan. 20, 1984.
Decided May 4, 1984.

Before FEINBERG, Chief Judge, VAN GRAAFEILAND and KEARSE, Circuit Judges.

VAN GRAAFEILAND, Circuit Judge:

O'Connell Machinery Company appeals from an order of the United States District Court for the Southern District of New York, 566 F.Supp. 1381 (Knapp, J.), which dismissed O'Connell's complaint containing an in rem cause of action against the *M/V Americana,* on the ground that the vessel was immune from arrest by virtue of the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1605(b). We affirm.

On September 23, 1982, O'Connell filed a complaint in the Southern District demanding personal recovery against Italia Di Navigazione, S.p.A., doing business as the Italian Line, and in rem recovery against one of its ships, the *M/V Americana,* for

damages to a gear generator shipped aboard the *Americana* from Genoa, Italy to New York City in 1981. When counsel for the Italian Line informed appellant's counsel that the Line was owned by a subdivision of the Republic of Italy and that the FSIA therefore immunized the vessel from prejudgment attachment, appellant requested the district court to require the Line to show cause why appellant should not be permitted to make the attachment. The district court rejected the application as a request for an advisory opinion, and this Court refused O'Connell's petition for a writ of mandamus.

O'Connell's counsel then notified counsel for the Italian Line that O'Connell intended to arrest the *Americana* unless the Italian Line posted a Letter of Guarantee securing the disputed amount. Faced with this threat, the Italian Line obtained a Letter of Guarantee from the Standard Steamship Owners' Protection and Indemnity Association Ltd. shortly before the ship's next arrival in New York. It followed this with a motion to dismiss appellant's complaint. This appeal is from the order granting Italian Line's motion.

Appellant challenges the district court's decision on several grounds. First, it contends that the Italian Government's ownership interest in the Italian Line was too remote to support the Line's claim of immunity under the FSIA. Second, it argues that Italy waived its right to assert sovereign immunity from prejudgment attachment. Finally, it contests the constitutionality of provisions in the FSIA which preclude prejudgment attachment in maritime cases. None of these contentions has merit.

The Foreign Sovereign Immunities Act insulates foreign states from the exercise of federal jurisdiction, except under the conditions specified in the Act. *See* 28 U.S.C. § 1604. Section 1603 defines "foreign state" to encompass any "agency or instrumentality" of a foreign state, and includes within the definition of "agen-

cy or instrumentality" any entity "which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof."

According to the affidavit of Gerardo Carante, Chief Officer of the Commercial Office at the Embassy of the Republic of Italy in Washington, a majority of the shares of the Italian Line is owned by the Societa' Finanziaria Maritima (FINMARE). FINMARE, in turn, is under the direct control of the Istituto per la Ricostruzione Industriale, a public financial entity which coordinates the management of the commercial enterprises of the Italian Government. Based on these facts, which appellant does not dispute, the district court correctly concluded that the Italian Line qualifies as an agency or instrumentality of the Republic of Italy. *See S & S Machinery Co. v. Masinexportimport*, 706 F.2d 411, 415 (2d Cir.), *cert. denied*, ____ U.S. ____, 104 S.Ct. 161, 78 L.Ed.2d 147 (1983); *In re Rio Grande Transport, Inc.*, 516 F.Supp. 1155, 1158 (S.D.N.Y. 1981).

The fact that the Italian Government saw fit to double-tier its administrative agencies did not compel a holding to the contrary. According to the legislative history of the FSIA, political subdivisions were intended to include "all governmental units beneath the central government." H.R.Rep. No. 1487, 94th Cong., 2d Sess. 15, *reprinted in* 1976 U.S. Code Cong. & Ad. News 6604, 6613. FINMARE fits comfortably within this definition. Moreover, the House Report indicates that "entities which meet the definition of an 'agency or instrumentality of a foreign state' could assume a variety of forms, including . . . a transport organization such as a shipping line. . . ." *Id.* at 6614.

One of the purposes of the FSIA was to eliminate the need for attaching the vessel of a foreign government for the purpose of obtaining jurisdiction. *Id.* at 6606. To discourage this practice,

the statute provides that notice of the suit will not be deemed effective if the plaintiff improperly has arrested a foreign vessel for the purpose of obtaining in rem jurisdiction. 28 U.S.C. § 1605(b). Prejudgment attachment is permitted only where the foreign state explicitly has waived its immunity and the purpose of the attachment is not to obtain jurisdiction. 28 U.S.C. § 1610(d).

Appellant contends that the Italian Government waived its right to assert sovereign immunity from prejudgment attachment when it became a party to the Treaty of Friendship, Commerce and Navigation between the United States and Italy, February 2, 1948, 63 Stat. 2255, T.I.A.S. No. 1965. Article XXIV(6) of the Treaty provides in part that Italy shall not claim immunity "from suit, from execution of judgment, or from any other liability to which a privately owned and controlled enterprise is subject." Relying on *Libra Bank Ltd. v. Banco Nacional de Costa Rica,* 676 F.2d 47, 49 (2d Cir. 1982), appellant argues that the phrase "or any other liability" is broad enough to include prejudgment attachments. We rejected a similar argument in *S & S Machinery Co.* v. *Masinexportimport, supra,* 706 F.2d at 416-18, and we see no reason to depart from that holding, which is in accord with the great weight of authority. *See id.* at 417.

To support its claim of unconstitutionality, appellant relies on Article III, Section 2, Cl. 1 of the Constitution, which provides in part that "[t]he judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction." Appellant contends that, in curtailing the right of in rem attachment against vessels of foreign states, Congress narrowed the limits of judicial admiralty jurisdiction and, in so doing, violated this constitutional provision. Appellant cites *Amstar Corp.* v. *S/S Alexandros T.,* 664 F.2d 904, 908-09 (4th Cir. 1981), and *Merchants National Bank of Mobile* v. *Dredge General G.L. Gillespie,* 663

F.2d 1338, 1350 (5th Cir. 1981), *cert. dismissed,* 456 U.S. 966, 102 S.Ct. 2263, 72 L.Ed.2d 865 (1982), as authority for the proposition that maritime liens traditionally have been treated as integral aspects of substantive maritime law. This being so, appellant argues, the immunization from attachment of the vessels of foreign states constitutes legislative interference with the jurisdiction of the admiralty courts.

This argument founders on several grounds. In the first place, at the time the Constitution was adopted, foreign governments played little or no role in the merchant marine. *Berizzi Brothers Co.* v. *Steamship Pesaro,* 271 U.S. 562, 573, 46 S.Ct. 611, 612, 70 L.Ed. 1088 (1926). When foreign governments began to operate ships for purposes of trade, the Supreme Court held in *Berizzi,* a seminal decision, that such ships were immune from arrest. *Id.* at 574, 46 S.Ct. at 612. It was the whittling away of this immunity that eventually led to the enactment of the FSIA. *See Ruggiero* v. *Compania Peruana De Vapores,* 639 F. 2d 872, 878-79 (2d Cir. 1981); *Victory Transport Inc.* v. *Comisaria General de Abastecimientos y Transportes,* 336 F.2d 354, 357-58 (2d Cir. 1964), *cert. denied,* 381 U.S. 934, 85 S.Ct. 1763, 14 L.Ed.2d 698 (1965). However, while the FSIA undoubtedly altered the rights of libelants as they preexisted the Act, it did not alter them as they preexisted the Constitution.

In the second place, the argument that the framers of the Constitution intended to preserve inviolate all the then existing substantive maritime rights has long since been rejected by the Supreme Court. "When the Constitution was adopted, the existing maritime law became the law of the United States 'subject to power in Congress to modify or supplement it as experience or changing conditions might require.' " *Detroit Trust Co.* v. *The Thomas Barlum,* 293 U.S. 21, 43, 55 S.Ct. 31, 38, 79 L.Ed. 176 (1934) (quoting *Panama Railroad Co.* v. *Johnson,* 264 U.S. 375, 386, 44 S.Ct. 391, 393, 68 L.Ed. 748 (1924));

see Victory Carriers, Inc. v. *Law*, 404 U.S. 202, 216, 92 S.Ct. 418, 427, 30 L.Ed.2d 383 (1971); *Hurst* v. *Triad Shipping Co.*, 554 F.2d 1237, 1241-46 (3d Cir.), *cert. denied*, 434 U.S. 861, 98 S.Ct. 188, 54 L.Ed.2d 134 (1977). Congress did no more than exercise this power when it enacted section 1605(b).

The judgment of the district court is affirmed.

Opinion of the District Court

O'CONNELL MACHINERY COMPANY, INC.,
Plaintiff,

v.

M.V. "AMERICANA" and ITALIA DI NAVIGAZIONE, S.p.A. (d/b/a ITALIAN LINE),
Defendants.

No. 82 Civ. 6341 (WK).

United States District Court,
S.D. New York.

July 5, 1983.

Memorandum & Order

WHITMAN KNAPP, District Judge.

Plaintiff brought an action against the Italian Line and the M.V. "AMERICANA," one of its vessels, for damages alleged to have been suffered by a generator transported on that ship from Genoa, Italy, to the port of New York. The case is before us on a motion to dismiss the complaint against the M.V. "AMERICANA." For reasons stated below, the motion is granted.

Background

Section 4 of the Foreign Sovereign Immunities Act of 1976 ("FSIA"), Pub.L. No. 94-583, 90 Stat. 2892, declares, in substance, that actions brought against a vessel owned by a "foreign state" to enforce a maritime lien, shall be deemed an *in personam* claim against the foreign state, provided certain procedures as to service and notice are followed. 28 U.S.C. § 1605(b).[1] The self-

[1]Recovery under such "in personam" actions is, however, limited to the value of the vessel upon which the maritime lien arose. The statutorily created claim is, therefore, not a "pure" *in personam* action, exposing the defendant to unlimited liability.

same section also states that, in exchange for what is in practice a "long arm" statute against a foreign state, *see Geveke & Co. v. Kompania di Awa I Elektrisidat* (S.D.N.Y. 1979) 482 F. Supp. 660, 662-63 (Weinfeld, J.), attachment of the vessel for jurisdictional purposes will no longer be an accepted procedure.[2] In order to discourage the use of jurisdictional attachment, the statute specifically provides that the *in personam* action shall be forfeited for all time if the plaintiff arrests a vessel for purposes of filing suit and is not able to show that, at the time of such arrest, he was unaware that the vessel was owned by a foreign state. *See* Kane, *Suing Foreign Sovereigns: A Procedural Compass,* 34 Stan.L. Rev. 385, 409-10 (1982).[3]

This action was filed on September 23, 1982. On several occasions during the subsequent two weeks, counsel for the Italian Line advised plaintiff's counsel that Italian Line was, indirectly, owned by the Italian Government and would therefore invoke the protection of the FSIA as an "agency or instrumentality of

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[2]The purpose of eliminating jurisdictional attachments was to ease the perceived international frictions which such attachments caused and, generally, to facilitate the conduct of foreign relations. See H.R. 94-1487, 94th Cong., 2d Sess., 26-27, *reprinted in* 1976 U.S. Code Cong. & Ad. News 6604, 6625-26.

[3]Professor Kane persuasively observes that

> One might note that although [jurisdictional attachments] are improper in any type of action under the [FSIA], there is no comparable penalty [of forfeiture] outside the admiralty field. The [FSIA] accords admiralty [attachment] cases special treatment because there was a greater need to provide some enforcement mechanism to force attorneys to abandon the traditional use of in rem jurisdiction in that field. Also, the potential for causing friction with foreign states is enormous in admiralty because attachment ties up the ship, cargo, and crew, and so represents the power to immobilize assets worth millions, irrespective of the amount of the claim involved. Kane, *supra,* at 410, n. 126.

a foreign state." See 28 U.S.C. § 1603(b).[4] Thereafter and before the time to answer had expired,[5] plaintiff brought on, by order to show cause, a motion which sought to compel the defendant immediately to establish its entitlement to invoke the FSIA. We denied the motion as premature on the ground that its object was to circumvent the professional responsibility which 28 U.S.C. § 1605(b) placed on plaintiff's counsel: namely, to decide whether the intended arrest was proper and then to face the unpleasant consequence of dismissal should that judgment be proven incorrect. Plaintiff then sought a Writ of Mandamus to compel us to decide the issue raised by his order to show cause. The Writ was denied.

Undaunted, plaintiff arrested the M.V. "AMERICANA" upon its arrival in New York.[6] Before us is a motion to dismiss the *in personam* action against the vessel on grounds that it was improperly attached for jurisdictional purposes.

Discussion

Upon defendant's showing that Italian Line is an "agency or instrumentality of a foreign state," the foregoing would ordinar-

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[4]It is, of course, apparent why defendant would wish to give such notice; namely, to insure that, in the event of improper jurisdictional attachment, plaintiff could not defeat the penalty of forfeiture by claiming that it was "unaware" that the ship was, in fact, owned by a foreign state. Plaintiff has repeatedly "charged" defendant with precisely such objective. We fail, however, to see grounds for protest: this is squarely what the purpose and the language of the FSIA invite defendant's counsel to do.

[5]"Sovereign immunity" is a defense. See, *e.g.*, *Castro* v. *Saudi Arabia* (W.D.Tex. 1980) 510 F.Supp. 309, 312.

[6]Plaintiff did not, strictly, arrest the vessel. A letter of undertaking issued by a P & I Club was posted by Italian Line to avoid the inconvenience of an arrest. We regard the posting of the letter of undertaking as the equivalent to an arrest.

ily require that we grant the motion to dismiss. *Jet Line Services, Inc.* v. *M/V Marsa El Hariga* (D.Md.1978) 462 F. Supp. 1165, 1174-78. Plaintiff seeks to avoid this result by arguing, *seriatim*, (a) that Italy has waived immunity from pre-judgment attachment; (b) that defendant has failed to provide sufficient proof as to the ownership of Italian Line; (c) that Italian Line is not entitled to FSIA protection; and (c) that 28 U.S.C. § 1605(b) is unconstitutional. All these arguments are without merit.

Plaintiff contends, first, that Article XXIV(6) of the Treaty of Friendship, Commerce and Navigation Between the United States of America and the Italian Republic, February 2, 1948, T.I.A.S. No. 1965,[7] waives defendant's immunity from pre-judgment attachment. To be sure, the protections of the FSIA—including that of immunity from pre-judgment attachment, 28 U.S.C. § 1609—may be explicitly waived by future treaties, 28 U.S.C. § 1610(d)(1), or by agreements, such as the one here at issue, in force at the time the FSIA was enacted. *See* 28 U.S.C. § 1609 ("Subject to *existing* . . . agreements . . .). However, the "waiver of immunity from prejudgment attachment [must] be *explicitly* made . . ." *S & S Machinery Co.* v. *Masinexportimport* (2d Cir. 1983) 706 F.2d 411, 416 (emphasis in original). Plaintiff relies solely on *Libra Bank Ltd.* v. *Banco Nacional de Costa Rica* (2d Cir. 1982) 676 F.2d 47, for the proposition that the words "shall [not] . . . claim . . . immunity . . . *from any other liability*" in the U.S.-Italy treaty indicate such explicit waiver of immunity

[7]The relevant language reads:

> No enterprise of either High Contracting Party which is publicly owned or controlled shall, if it engages in commercial, manufacturing, processing, shipping or other business activities within the territories of the other High Contracting Party, claim or enjoy, either for itself or for its property, immunity therein from taxation, from suit, from execution of judgment, or from *any other liability* to which a privately owned and controlled enterprise is subject therein. (Emphasis added.)

as to pre-judgment attachment. Our Court of Appeals has recently held, however, that *Libra Bank* may not be so read and, therefore, that the words "from any other liability" do not—in and of themselves—operate as the required waiver. *S & S Machinery, supra,* 706 F.2d 411 (dealing with similar language in a treaty between the United States and Romania). Plaintiff has offered no more than his reliance on *Libra Bank;*[8] accordingly, his first contention must fail.

Plaintiff next argues that insufficient proof has been presented to support defendant's contention that Italian Line is an "agency or instrumentality" of the Republic of Italy. We have before us, however, the affidavit of Gerardo Carante, "Counselor of Commercial Activities of the Republic of Italy" and "chief officer of the Commercial office at the Embassy of the Republic of Italy," describing the ownership of Italian Line. This affidavit, executed on the letterhead of the Italian Embassy in Washington, states

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[8]Shortly after *S. & S Machinery* had been decided, plaintiff submitted a supplemental brief contending, in substance, that the words "for its property" which appear in the U.S.-Italy treaty, see note 7, *supra,* but do not appear in the U.S.-Romania agreement at issue in *S & S Machinery,* rendered that opinion inapposite to the situation at bar. This argument is without merit. The question here is not *"What* is immune from pre-judgment attachment?" but "What *type* of attachment do the words 'other liability' cover?" As to the latter question, *S & S Machinery* is as applicable to the reading of the U.S.-Italy treaty as it is to the interpretation of the U.S.-Romania agreement at issue in that case. To the extent that plaintiff's argument may be read as suggesting that *S & S Machinery* is inapplicable to *in rem* actions, it is also unpersuasive. The concomitant of an *in rem* action is a jurisdictional (pre-judgment) attachment, to which the teachings of *S & S Machinery*—inasmuch as they instruct us to find consent to pre-judgment attachments only where it is *clearly* expressed—are fully applicable. Moreover, plaintiff offers nothing of substance to support its interpretation of the purpose of the U.S.-Italy agreement. We note that defendant's rejoinder to the effect that the result advocated by plaintiff would be at odds with the FSIA, also misses the mark: the issue is the purpose of the treaty, not that of the FSIA.

that the majority of the shares of Italian Line is owned by FINAMARE, a "subdivision of the Instituto per la Riconstruzione Industriale ("IRI"), a government entity which coordinates the management of Italian government enterprises. IRI's annual budget and plans, in turn, are approved by a member of the Italian Cabinet and, ultimately, submitted to the Parliament. *See* Carante's Affidavit ¶¶ 4-8. In our view this establishes that Italian Line is, indeed, an "agency or instrumentality of a foreign state," as defined in 28 U.S.C. § 1603(b). *See also* H.R. 94-1487, 94th Cong., 2d Sess., 15-16, *reprinted in* 1976 U.S. Code Cong. & Ad. News 6604, 6613-14. "Statements of foreign officials . . . have been accorded great weight in determining whether an entity is entitled to claim the protection of the FSIA." *S & S Machinery, supra,* at 415 (citing with approval *Yessenin-Volpin* v. *Novosti Press Agency* (S.D.N.Y. 1978) 443 F. Supp. 849, 854). As was also the case in *S & S Machinery,* "[plaintiff] failed to rebut any of this persuasive evidence, arguing instead that more was required to prove agency or instrumentality status." *Id.* Plaintiff's insistence that "more" be provided goes, in fact, to the *form* of defendant's submission, rather than to its contents. These demands are without merit.[9] We have before

[9]Plaintiff argues, in substance, that "authentication" is required because there is no indication that the Italian government is "aware" of Signor Carante's "involvement." Plaintiff's Memorandum in Opposition at 5. In oral argument plaintiff went so far as to suggest that the claim of immunity was, in fact, a ruse and that, eventually, the Italian government would disclaim any involvement or relation with the defendants. *See also* Plaintiff's Memorandum in Opposition at 7 ("it is alleged that the defense [of sovereign immunity] is not being raised by the government but by a private party"). There is nothing before us, however, to substantiate the bizarre contention that the claim of immunity is no more than a swindle to dissolve the attachment and, thus, to deprive plaintiff of the means to recover on a subsequent judgment. Should plaintiff's now unsupported fears in the future be realized, we may then decide what should be the exposure to execution of, at least, the commercial properties of

(Footnote continued on following page)

us an affidavit substantially more explicit than the—by comparison—conclusory remarks submitted in *Novosti Press, supra,* 443 F.Supp. at 854 ("[defendant] was an instrumentality of the [government]"), cited with approval in *S & S Machinery, supra,* at 414. Accordingly, plaintiff's second argument in opposition must also fail.

Third, plaintiff contends that, in any event, Italian Line is not entitled to protection under the FSIA because it is not an "agency or instrumentality of a foreign state." Whereas it is conceded that IRI may qualify as a "foreign state," plaintiff argues that the chain of ownership so far removes Italian Line from direct government control as to make it " 'too remote' to be considered as a 'foreign'." Plaintiff's Memorandum of Law at 8-9. This argument is without merit. It rests on scant and inapposite precedent[10] and boils down to the red herring that "what [Italian Line] requests this Court to do is ignore its corporate

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any party to the fraud. *See* 28 U.S.C. § 1610(a) and (b); *S & S Machinery, supra,* at 416 (waiver of immunity from attachments as an aid in execution can be *implied* and need not be explicitly stated); H.R.Rep. No. 94-1487, 94th Cong., 2d Sess., 28-29, *reprinted in* 1976 U.S. Code Cong. & Ad. News 6604, 6627-28 (suggesting that no more than an "official statement" or "act" may be required to *imply* waiver of post-judgment attachment in aid of execution).

[10]Plaintiff relies on *Standard Oil* v. *Starks* (7th Cir. 1975) 528 F.2d 201 for the argument that "if the United States Postal Service is subject to garnishment . . . then a foreign corporation should be treated similarly." Plaintiff's Memorandum of Law at 9. Without investigating the logic of this argument, we need only observe that the Postal Service's subjection to *post-judgment* garnishment of *its employees'* wages, was predicated in that case on an explicit finding that immunity had been waived. *Id.* at 202. A finding that Congress has implictly waived immunity as to the Postal Service has no bearing on the extent to which it might have done so under the FSIA. Plaintiff also refers us to *Edlow*

(Footnote continued on following page)

form . . ." *Id.* at 9. The FSIA specifically provides that "corporate form"—in and of itself—be immaterial to the relevant determination. See 28 U.S.C. § 1603(b)(1). Accordingly, we conclude that Italian Line is indeed an "agency or instrumentality" of the Republic of Italy as defined in 28 U.S.C. § 1603(b). *See also* H.R.Rep. No. 94-1487, 94th Cong., 2d Sess., 15-16, *reprinted in* 1976 U.S. Code Cong. & Ad. News 6604, 6613-15 (shipping line suable in its own name as a specific example of "agency or instrumentality").

Finally, it is contended that the curtailment of pre-judgment attachment is unconstitutional. The substance of plaintiff's argument is that a statute may not eliminate "traditional" *in rem* actions—which existed at the time the Constitution was adopted—because Article III extends the judicial power of the United States to all cases in admiralty. Accordingly, the FSIA infringes on the constitutional grant of admiralty jurisdiction. The major premise implicit in plaintiff's argument is that an action against a sovereign is an action in "admiralty" when it is of a maritime

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(Footnote continued from previous page)

International Co. v. *Nuklearna Elektrarna Krsko* (D.D.C. 1977) 441 F.Supp. 827, for the proposition that if an institution is " 'virtually free of direct government control' then it cannot be considered to be an agency or instrumentality of the foreign state." Plaintiff's Memorandum at 9. Apart from the absence of evidence to contradict the submissions detailing the extent of government control of Italian Line, we observe that in *Edlow* it was *plaintiff* who insisted, for jurisdictional reasons, that the defendant was an "agency or instrumentality" of a foreign (socialist) state; immunity was not the issue. Furthermore, in finding that the defendant was not such instrumentality, the judge found it necessary to discuss the issue of "control" in rejecting as insufficient plaintiff's *sole* argument that "all property under a socialist system . . . is subject to the ultimate ownership and authority of the state." *Edlow, supra,* 441 F.Supp. at 831. This *presumption* is not at issue here and, in any event, the evidence of government ownership and control in this case goes well beyond the naked presumption offered in *Edlow*.

nature. We have been offered nothing to support this proposition. Indeed, such brief review as we have made suggests that suits against a sovereign are outside constitutionally granted power and, in particular, outside the scope of traditional admiralty jurisdiction.[11]

Under English law the jurisdiction of all courts derived, ultimately, from the Crown, proceedings ran in the King's name, see 10 W. Holdsworth, A History of English Law 414-17 (1938), and the sovereign could not be sued in *his* court without consent. *See* 9 W. Holdsworth, *supra*, 8-39 (1926). The comparable principle of "sovereign immunity" was also adopted by American law. *See Briggs* v. *The Lightboats* (1865) 93 Mass. (11 Allen) 157 (thorough review of sovereign immunity in old English and American law). We have found nothing to suggest either that, at the time the Constitution was adopted, the Court of Admiralty was otherwise empowered to entertain suits against the sovereign, *see* 5 W. Holdsworth, *supra*, 125-29, 137-39, 143 (3d ed. 1923); T. Plucknett, A Concise History of the Common Law 657-664 (5th ed. 1956), or that American courts viewed admiralty jurisdiction as comprehending such actions. *See, e.g.*, 1 Kent, Commentaries on American Law *354-*380; *United States* v. *Lee* (1882) 106 U.S. 196, 209, 1 S.Ct. 240, 251, 27 L.Ed. 171. In fact, the Supreme Court first articulated the doctrine of sovereign immunity in a *maritime* case involving the *arrest* of a foreign man-of-war, *The Schooner Exchange* v. *M'Faddon* (1812) 11 U.S. (7 Cranch) 116, 3 L.Ed. 287, and specifically declared that the Constitution of the United States granted no jurisdiction over the foreign sovereign there involved.

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[11]In light of the basis of our ruling we need, therefore, not consider the validity of plaintiff's "minor" premise, namely whether the elimination of the right to proceed *in rem*—which speaks to jurisdiction over the *res*—would, otherwise, constitute a curtailment of admiralty *subject matter* jurisdiction.

Id. at 123. It has therefore been axiomatic that, where the defendant is a sovereign, it is immaterial that the action be of a maritime nature—there is no subject matter jurisdiction, except as granted by (implicit or statutory) consent. *Cf., e.g.,* G. Gilmore & C. Black, The Law of Admiralty §§ 9-12, 11-11 (2d ed. 1975) (sovereign immunity may bar recovery against the sovereign). Therefore, it cannot be said that admiralty jurisdiction encompassed suits against a sovereign, even if the actions were of a maritime character. *Cf. McElrath* v. *United States* (1880) 102 U.S. 426, 440, 26 L.Ed. 189 (suits against the sovereign are not at "common law" for purposes of right to jury trial); *United States* v. *Sherwood* (1940) 312 U.S. 584, 61 S.Ct. 767, 85 L.Ed. 1058 (same); *Glidden Co.* v. *Zdanok* (1962) 370 U.S. 530, 572, 82 S.Ct. 1459, 1484, 8 L.Ed.2d 671 (same).

Inasmuch as suits against a sovereign are subject to its consent, the correlative power generally to condition such consent—in the maritime context or otherwise—is, by now, an established principle. *See, e.g., Szyka* v. *Secretary of Defense* (2d Cir. 1975) 525 F.2d 62, 65; *Roberts* v. *United States* (9th Cir. 1974) 498 F.2d 520, 525. The curtailment of the right to proceed *in rem* is one such proper limitation.

The foregoing observations can best be illustrated in this context by reference to the Suits in Admiralty Act ("SIAA"), 46 U.S.C. §§ 741-52. It provides, in relevant part, for the elimination of the right to arrest United States vessels and for the substitution of "an equivalent remedy in personam [against the United States] for the [eliminated] right in rem against the vessel." *Schnell* v. *United States* (2d Cir.) 166 F.2d 479, 481, *cert. denied* (1948) 334 U.S. 833, 68 S.Ct. 1346, 92 L.Ed. 1760. *See also* 46 U.S.C. §§ 741-42; *Szyka* v. *Secretary of De-*

fense, supra, 525 F.2d at 65, n. 4.[12] This is precisely the restriction which, as enacted by the FSIA,[13] plaintiff contends is beyond the power of Congress to impose. Yet this particular SIAA restriction has never been questioned as improper, *Schnell* v. *United States, supra,* 166 F.2d at 481; *Eastern Transport Co.* v. *United States* (E.D.N.Y. 1951) 98 F.Supp. 36, 38 (exemption from arrest merely restores immunity taken away by another statute) and, indeed, none of the several restrictions under the SIAA has been subjected to serious judicial challenge. *See Szyka* v. *Secretary of Defense, supra,* 525 F.2d at 62 (upholding constitutionality of SIAA); *Roberts* v. *United States, supra,* 498 F. 2d 520 (same). Plaintiff has suggested nothing to explain why Congress may not impose precisely the same limitation under the FSIA which for more than sixty years it has been able to require under the SIAA.[14]

Conclusion

For the foregoing reasons the *in personam* action created by

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[12]The SIAA was originally enacted to relieve the United States of the inconvenience caused by Supreme Court interpretations of a previous *statute,* the Shipping Act of 1916, which interpretations resulted in government vessels being subject to *in rem* proceedings and, thus, to arrest. Its later amendments were intended to bring, *by statute,* all "admiralty" claims against the United States within the jurisdiction of the District Courts. *Kelly* v. *United States* (2d Cir. 1976) 531 F.2d 1144, 1148-49. It is clear that the SIAA is—as is the FSIA—an immunity-waiving statute. *Nelson* v. *United States* (9th Cir. 1960) 639 F.2d 469, 473.

[13]The similarity in the schemes under the SIAA and the FSIA is not likely to have been coincidental. See H.R. No. 94-1487, 94th Cong., 2d Sess., 27, *reprinted in* 1976 U.S. Code Cong. & Ad. News 6604, 6626.

[14]The SIAA does not include a forfeiture provision upon improper arrest. Plaintiff has consistently argued, however, that it is the curtailment of *in rem* actions which renders the FSIA unconstitutional, not its forfeiture provision. As to the former, the SIAA and the FSIA are indeed similar.

the FSIA is hereby DISMISSED. We observe, however, that—unlike the situation in *Jet Line Services, supra*—the practical consequence of such dismissal is, in this case, insignificant. Defendant has conceded in oral argument that the separate *in personam* action against Italian Line arising out of the bill of lading *contract* and in which jurisdiction is predicated on the presence of Italian Line in New York, continues unaffected by this dismissal. *Cf. Velidor* v. *L/P/ Benghazi* (3d Cir. 1981) 653 F.2d 812, 817-19.

SO ORDERED.

Mandate of the United States Court of Appeals for the Second Circuit Filed on November 18th, 1982 Denying Plaintiff's Petition for a Writ of Mandamus

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

82-3078

In Re:

O'CONNELL MACHINERY COMPANY INCORPORATED,
Petitioner

A petition for a writ of mandamus having been filed,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

Order Filed October 18th, 1982, of the Honorable Whitman Knapp Denying Application

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

O'CONNELL MACHINERY COMPANY INCORPORATED,

Plaintiff,

—against—

M.V. "AMERICANA," her engines, boilers, tackle, etc. and ITALIA DI NAVIGAZIONE S.p.A. (d/b/a ITALIAN LINE),

Defendant.

ORDER

Index No. 82 Civ. 6341 (WK)

Plaintiff's application for an Order to Show Cause dated October 7th, 1982 is denied. Plaintiff seeks an advisory opinion of the Court. Plaintiff is not entitled to resolution of these issues unless and until arrest of the vessel is accomplished, with its attendant risks, and defendant actually seeks the protection of the Foreign Sovereign Immunities Act, 28 USC §1602, et seq. (The Court has attached to this order a letter from plaintiff's counsel representing that the language of this order has been approved, as the Court had directed, by counsel for both parties.)

Whitman Knapp
U.S.D.J.

October 14, 1982.

Order filed October 18th, 1982, of the Honorable Whitman Knapp denying Application

October 14th, 1982

Honorable Whitman Knapp
United States District Judge
United States District Court
Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007

Re: O'CONNELL MACHINERY CO., INC. v. M.V. AMERICANA, etc. and ITALIA DI NAVIGAZIONE S.p.A. (d/b/a ITALIAN LINE)
Index No. 82 Civ. 6341 (WK)
Our File No. 17583 – GFC

Dear Judge Knapp:

We enclose herewith the original Order relative to the captioned matter, the form and content of which have been approved by Mr. DeOrchis of Haight, Gardner, Poor & Havens.

Very truly yours,

HILL RIVKINS CAREY LOESBERG O'BRIEN & MULROY
George F. Chandler III

GFC:vjs

Enc.
cc: Vincent M. DeOrchis, Esq.
Haight, Gardner, Poor & Havens
One State Street Plaza
New York, New York 10004

Treaty of Friendship Commerce and Navigation Between the United States and Italy

ARTICLE XIX

1. Between the territories of the High Contracting Parties there shall be freedom of commerce and navigation.

2. Vessels under the flag of either High Contracting Party, and carrying the papers required by its national law in proof of nationality, shall be deemed to be vessels of that High Contracting Party both within the ports, places and waters of the other Hight Contracting Party and on the high seas. As used in this Treaty, "vessels" shall be construed to include all vessels of either High Contracting Party whether privately owned or operated or publicly owned or operated. However, the provisions of this Treaty other than this paragraph and paragraph 4 of Article XX shall not be construed to accord rights to vessels of war or fishing vessels of the other High Contracting Party; nor shall they be construed to extend to nationals, corporations and associations, vessels and cargoes of, or to articles the growth, produce or manufacture of, such other High Contracting Party any special privileges restricted to national fisheries or the products thereof.

3. The vessels of either High Contracting Party shall have liberty, equally with the vessels of any third country, to come with their cargoes to all ports, places and waters of the other High Contracting Party which are or may hereafter be open to foreign commerce and navigation.

ARTICLE XX

1. The vessels and cargoes of either High Contracting Party shall, within the ports, places and waters of the other High Contracting Party, in all respects be accorded treatment no less favorable than the treatment accorded to the vessels and cargoes of such other High Contracting Party, irrespective of the port

of departure or the port of destination of the vessel, and irrespective of the origin or the destination of the cargo.

2. No duties of tonnage, harbor, pilotage, lighthouse, quarantine, or other similar or corresponding duties or charges, of whatever kind or denomination, levied in the name or for the profit of the government, public functionaries, private individuals, corporations or establishments of any kind, shall be imposed in the ports, places and waters of either High Contracting Party upon the vessels of the other High Contracting Party, which shall not equally and under the same conditions be imposed upon national vessels.

3. No charges upon passengers, passenger fares or tickets, freight moneys paid or to be paid, bills of lading, contracts of insurance or re-insurance, no conditions relating to the employment of ship brokers, and no other charges or conditions of any kind, shall be imposed in a way tending to accord any advantage to national vessels as compared with the vessels of the other High Contracting Party.

4. If a vessel of either High Contracting Party shall be forced by stress of weather or by reason of any other distress to take refuge in any of the ports, places or waters of the other High Contracting Party not open to foreign commerce and navigation, it shall receive friendly treatment and assistance and such repairs, as well as supplies and materials for repair, as may be necessary and available. This paragraph shall apply to vessels of war and fishing vessels, as well as to vessels as defined in paragraph 2 of Article XIX.

5. The vessels and cargoes of either High Contracting Party shall not in any case, with respect to the matters referred to in this Article, receive treatment less favorable than the treatment which is or may hereafter be accorded to the vessels and cargoes of any third country.

Treaty of Friendship Commerce and Navigation between the United States and Italy

ARTICLE XXI

1. It shall be permissible, in the vessels of either High Contracting Party, to import into the territories of the other High Contracting Party, or to export therefrom, all articles which it is or may hereafter be permissible to import into such territories, or to export therefrom, in the vessels of such other High Contracting Party or of any third country; and such articles shall not be subject to any higher duties or charges whatever than those to which the articles would be subject if they were imported or exported in vessels of the other High Contracting Party or of any third country.

2. Bounties, drawbacks and other privileges of this nature of whatever kind or denomination which are or may hereafter be allowed, in the territories of either High Contracting Party, on articles imported or exported in national vessels or vessels of any third country shall also and in like manner be allowed on articles imported or exported in vessels of the other High Contracting Party.

ARTICLE XXII

1. Vessels of either High Contracting Party shall be permitted to discharge portions of cargoes, including passengers, at any ports, places or waters of the other High Contracting Party which are or may hereafter be open to foreign commerce and navigation, and to proceed with the remaining portions of such cargoes or passengers to any other such ports, places or waters, without paying higher tonnage dues or port charges in such cases than would be paid by national vessels in like circumstances, and they shall be permitted to load in like manner, in the same voyage outward, at the various ports, places and waters which are or may hereafter be open to foreign commerce and navigation. The

vessels and cargoes of either High Contracting Party shall be accorded, with respect to the matters referred to in this paragraph, treatment in the ports, places and waters of the other High Contracting Party no less favorable than the treatment which is or may hereafter be accorded to the vessels and cargoes of any third coyntry.[1]

2. The coasting trade and inland navigation of each High Contracting Party are excepted from the requirements of national and most-favored-nation treatment.

ARTICLE XXIV

5. Each High Contracting Party reserves the right to deny any of the rights and privileges accorded by this Treaty to any corporation or association created or organized under the laws and regulations of the other High Contracting Party in the ownership or direction of which nationals of any third country or countries have directly or indirectly a controlling interest.

6. No enterprise of either High Contracting Party which is publicly owned or controlled shall, if it engages in commercial, manufacturing, processing, shipping or other business activities within the territories of the other High Contracting Party, claim or enjoy, either for itself or for its property, immunity therein from taxation, from suit, from execution of judgment, or from any other liability to which a privately owned and controlled enterprise is subject therein.

[1]The word "coyntry" should read country".

Foreign Sovereign Immunities Act of 1976

§ 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

§ 1603. Definitions

For purposes of this chapter—

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

§ 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver.

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue; or

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss or property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim upon the excercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: *Provided*, That--

(1) notice of the suit is given by delivery of a copy of

the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; but such notice shall not be deemed to have been delivered, nor may it thereafter be delivered, if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit—unless the party was unaware that the vessel or cargo of a foreign state was involved, in which event the service of process of arrest shall be deemed to constitute valid delivery of such notice; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in subsection (b)(1) of this section or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such part determined the existence of the foreign state's interest.

Whenever notice is delivered under subsection (b)(1) of this section, the maritime lien shall thereafter be deemed to be an in personam claim against the foreign state which at that time owns the vessel or cargo involved: *Provided,* That a court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose, such value to be determined as of the time notice is served under subsection (b)(1) of this section.

§ 1606. Extent of liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place

where the action or omission ocurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

§ 1607. Counterclaim

In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim—

(a) for which a foreign state would not be entitled to immunity under section 1605 of this chapter had such claim been brought in a separate action against the foreign state; or

(b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or

(c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.

§ 1608. Service; time to answer; default

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an

applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent author-

ized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state—

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

(c) Service shall be deemed to have been made—

(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a for-

eign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

§ 1609. Immunity from attachment and execution of property of a foreign state

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

§ 1610. Exceptions to the immunity from attachment or execution

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property—

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: *Provided,* That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment.

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1650 (a)(2), (3), or (5), or 1605(b) of this chapter, regardless of whether the property is or was used for the activity upon which the claim is based.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined

that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if—

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.

§ 1611. Certain types of property immune from execution

(a) Notwithstanding the provisions of section 1610 of this chapter, the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States.

(b) Notwithstanding, the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if—

(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such

bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver, or

(2) the property is, or is intended to be, used in connection with a military activity and

(A) is of a military character, or

(B) is under the control of a military authority or defense agency.

No. 84-410

Office - Supreme Court, U.S.
FILED
NOV 19 1984
ALEXANDER L. STEVAS.

In the Supreme Court of the United States

OCTOBER TERM, 1984

O'CONNELL MACHINERY CO., PETITIONER

v.

M.V. "AMERICANA", ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-410

O'CONNELL MACHINERY CO., PETITIONER

v.

M.V. "AMERICANA", ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks review of the decision of the court of appeals upholding the constitutionality, as applied to commercial vessels owned by foreign sovereigns, of 28 U.S.C. 1605(b), a provision of the Foreign Sovereign Immunities Act of 1976 (FSIA) that prohibits prejudgment attachment of the vessels or cargoes of foreign governments and substitutes an in personam action limited to the value of the vessel or cargo.

1. Petitioner brought this action in the United States District Court for the Southern District of New York against respondents Italian Line and the M.V. *Americana*, one of its vessels, for damages alleged to have been suffered by petitioner's cargo on that ship. Although aware of respondents' claim that the vessel was indirectly owned by the Italian Government, petitioner in effect arrested the *Americana* upon its arrival in New York. Pursuant to 28 U.S.C. 1605(b)(1), the district court dismissed the in rem

action against the vessel on the ground that the arrest was improper. Pet. App. 8a-19a.

On appeal, pursuant to Fed. R. App. P. 44, the court of appeals certified to the Attorney General the presence of a challenge to the constitutionality of a federal statute. The United States intervened pursuant to 28 U.S.C. 2403(a).

The court of appeals affirmed, rejecting petitioner's arguments that (1) the Italian Government's interest in the Italian Line was too remote to support immunity, (2) Italy by treaty had waived immunity from prejudgment attachment, and (3) 28 U.S.C. 1605(b) is unconstitutional insofar as it precludes prejudgment attachment of commercial vessels owned by foreign sovereigns. Pet. App. 2a-7a.

2. In admiralty cases brought to enforce maritime liens against vessels of foreign states, Section 1605(b)(1) provides that the lien shall be deemed an in personam claim limited to the value of the vessel, and that arrest of the vessel "pursuant to process obtained on behalf of the party bringing the suit" will result in immunity from any claim. See *Jet Line Services, Inc.* v. *M/V Marsa El Hariga*, 462 F. Supp. 1165, 1174-1178 (D. Md. 1978). Petitioner argues (Pet. 7-12) that this provision of the FSIA violates Article III, Section 2, Clause 1 of the Constitution, which provides that "[t]he Judicial Power shall extend * * * to all Cases of admiralty and maritime Jurisdiction." This argument is supported by no court decision and is entirely without merit.

a. In 1976, Congress passed the FSIA in order to free the federal government from case-by-case diplomatic pressures in the determination of foreign sovereign immunity, to clarify the governing standards, and to assure litigants that immunity decisions are made on purely legal grounds and under procedures that ensure due process. *Verlinden, B.V.* v. *Central Bank of Nigeria*, No. 81-920 (May 23, 1983), slip op. 7. In addition, by providing "for the first time in U.S.

law, * * * a statutory procedure for making service upon, and obtaining in personam jurisdiction over, a foreign state," the FSIA "render[ed] unnecessary the practice of seizing and attaching the property of a foreign government for the purpose of obtaining jurisdiction." H.R. Rep. 94-1487, 94th Cong., 2d Sess. 8 (1976). The FSIA accordingly precluded prejudgment attachment of the property of foreign sovereigns, except in limited circumstances.[1]

This policy is codified in 28 U.S.C. 1605(b), which denies immunity to a foreign state in cases where a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of that foreign state engaged in commercial activity. The maritime lien "shall * * * be deemed to be an in personam claim against the foreign state," but judgment is limited to the value of the vessel or cargo upon which the lien arose. However, Section 1605(b)(1) preserves the foreign government's immunity from in personam liability in the event that a party attaches its vessel or cargo in violation of the section (unless the party was unaware that the vessel or cargo was owned by a foreign state). Total immunity remains as to any in rem proceeding (28 U.S.C. 1604).

In sum, the FSIA merely substitutes a long-arm provision and a right of personal service for the prior procedure of in rem attachment, in cases involving commercial vessels owned by foreign sovereigns. In addition, in Section 1610 the FSIA for the first time makes some property of foreign states subject to execution. Any "loss" of prejudgment and

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[1]Prejudgment attachment of property owned by foreign sovereigns is permitted only if "the foreign state has explicitly waived its immunity from attachment prior to judgment" and "the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction." 28 U.S.C. 1610(d).

attachment remedies thus was compensated for not only by the long-arm and service provisions of the FSIA, but also by Section 1610. See *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. 91 (1976) (testimony of Michael M. Cohen). There has, therefore, been no substantial diminution of a plaintiff's or libellant's substantive rights in admiralty, as petitioner suggests (Pet. 9).[2] There has merely been a readjustment of available remedies.

b. The decision below is consistent with numerous decisions by this Court holding that Congress has the constitutional authority to modify the law of admiralty. For instance, in *Detroit Trust Co.* v. *The Thomas Barlum*, 293 U.S. 21 (1934), relied upon by petitioner (Pet. 7), the Court

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[2]As the court of appeals explained (Pet. App. 6a), unconsented suits against foreign sovereigns were not permitted in admiralty at the time of the adoption of the Constitution. Petitioner's argument to the contrary (Pet. 10-12) with regard to government-owned commercial ships is without merit. *Bank of the United States* v. *Planter's Bank*, 22 U.S. (9 Wheat.) 904 (1824), did not involve the immunity of vessels at all. *United States* v. *Wilder*, 28 F. Cas. 601 (C.C.D. Ma. 1838) (No. 16, 694), merely held that government-owned cargo was subject to the general average. *The Fidelity*, 8 F. Cas. 1189 (C.C.S.D.N.Y. 1879) (No. 4758), upheld the immunity of a tug owned by a municipal corporation; dictum apparently referred to by petitioner involved private ships captured as prize. 8 F. Cas. at 1191. The fact that *Berizzi Bros.* v. *Steamship Pesaro*, 271 U.S. 562 (1926), relied upon English cases that very recently have been overruled (Pet. 12) in no way undercuts the court of appeals' reliance on *The Pesaro* for the proposition that government-owned commercial vessels would have been immune in 1789. Indeed, this Court recently relied on *The Pesaro* for precisely the proposition at issue here: that early decisions of this Court "extend[ed] virtually absolute immunity to foreign sovereigns." *Verlinden, B.V.*, slip op. 5. In any event, as the court of appeals held in the alternative (Pet. App. 6a-7a), Congress has the power to modify maritime law regardless of the status of maritime law in 1789.

upheld a provision in the Ship Mortgage Act of 1920 permitting the foreclosure of a ship mortgage by an in rem suit in admiralty. 293 U.S. at 42-52. Prior to the Ship Mortgage Act there was no such jurisdiction in admiralty. *Id.* at 32. This Court has subsequently upheld the statutory extension of maritime law protection to seamen injured while ashore in the service of their vessels, *O'Donnell* v. *Great Lakes Dredge & Dock Co.*, 318 U.S. 36, 43 (1943), and the statutory extension of admiralty jurisdiction to torts committed by a shipowner while the ship is being unloaded, even though the impact of the tort is felt ashore. *Gutierrez* v. *Waterman S.S. Corp.*, 373 U.S. 206, 210 (1963).

Just as Congress may provide remedies previously unavailable in admiralty, it also may limit or abolish remedies previously available in admiralty. See *Hurst* v. *Triad Shipping Co.*, 554 F.2d 1237, 1244-1246 (3d Cir.), cert. denied, 434 U.S. 861 (1977), following *Lucas* v. *"Brinknes" Schiffahrts Ges.*, 387 F. Supp. 440 (E.D. Pa. 1974). Merely because federal judicial power may extend to categories of cases under Article III, Section 2, Clause 1, does not mean that Congress must extend federal jurisdiction to all cases within such categories (*e.g.*, *Sheldon* v. *Sill*, 49 U.S. (8 How.) 441 (1850)), or that Congress is bound by past forms of remedies available.

Plaintiff relies (Pet. 8) upon a statement in *Panama R.R.* v. *Johnson*, 264 U.S. 375, 386 (1924), to the effect that there are "boundaries" to admiralty jurisdiction, which cannot be altered by legislation. Where those boundaries lie, however, is very much in doubt, since neither that decision nor any other decision of this Court has relied upon the theoretical existence of such boundaries to invalidate a statutory modification of remedies in admiralty. Indeed, in *Panama R.R.* this Court *upheld* the federal legislation under attack (Merchant Marine (Jones) Act, 46 U.S.C. 688) despite its

thoroughgoing rearrangement of substantive maritime 264 U.S. at 388.

Wherever those boundaries may be, the elimination of an in rem remedy against foreign sovereigns would clearly be constitutional, in view of the in personam remedy granted to plaintiffs suing sovereigns engaged in commercial activity. The distinctions between an in rem proceeding and the in personam remedy provided by the FSIA are distinctions about the form in which jurisdiction is asserted, not the nature of the underlying cause of action. Cf. *Shaffer* v. *Heitner*, 433 U.S. 186, 212 (1977).

Petitioner asks this Court, in effect, to draw rigid constitutional lines in this area, where heretofore the Court "consistently has deferred to the decisions of the political branches — in particular, those of the Executive Branch — on whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities." *Verlinden, B.V.*, slip op. 5-6 (citing *Ex parte Peru*, 318 U.S. 578, 586-590 (1943); *Mexico* v. *Hoffman*, 324 U.S. 30, 33-36 (1945)). Neither the text of the Constitution nor any precedent of this Court supports petitioner's argument that Congress is without power to determine that maritime liens against commercial vessels owned by foreign sovereigns must be enforced on an in personam rather than an in rem basis.[3]

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[3]We have limited this memorandum to the issue that forms the basis for the government's right to intervene, the constitutionality of the FSIA. We also agree, however, with the court of appeals' resolution of the waiver issue under the Treaty of Friendship, Commerce, and Navigation with Italy. See Pet. App. 5a.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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No. 84-410

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

O'CONNELL MACHINERY COMPANY, INC.,

Petitioner,

against

M.V. "AMERICANA", her engines, boilers, tackle, etc. and ITALIA DI NAVIGAZIONE S.p.A. (d/b/a ITALIAN LINE),

Respondents.

REPLY BRIEF OF THE PETITIONER

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In The
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O'CONNELL MACHINERY COMPANY, INC.,
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—against—

M.V. "AMERICANA," *et al.*,
Respondents.

On Petition for a Writ of Certiorari To
The United States Court of Appeals For
The Second Circuit

REPLY BRIEF OF THE PETITIONER

Petitioner hereby replies to the memorandum for the United States in opposition to the petition for Certiorari in this matter, received by mail on November 27th, 1984.

1. The government supports the decision below for the proposition that the Congress has the constitutional authority to change the Law of Admiralty. However, the government goes a step further and states that the Congress may limit or abolish remedies previously available in Admiralty (Gov. 5), citing *Hurst* v. *Triad Shipping Co.*, 554 F.2d 1237, 1244-1246 (3 Cir. 1977) *cert. den.* 434 U.S. 861 (1977).*

There can be no debate that Congress can "alter, qualify or supplement" or "modify or supplement" the maritime law. Only a purist could argue in favor of maintaining the practice with

**Hurst* involved no *in rem* claim but the Court gratuitously discussed the availability of such a remedy, noting that abolishment of an *in rem* action would not alter the rules being considered. Further, the case concerned Longshoremen's rights to which the Admiralty jurisdiction would not extend until 1948, thus no Constitutional issue was present, as it is in this matter, and *Hurst* is pure dictum.

rules applicable to two hundred years ago. But the *elimination* of any class of *in rem* actions is not an alteration. It is no less than the exclusion of a thing (that is a substantive right) falling clearly within the boundaries of the maritime law—which Congress can not do. The government's arguments fail to make the distinction between the various cases concerning the expansion of the Admiralty jurisdiction with substantive rights existing under the Constitution. Modification of the jurisdiction does not insult the Constitution as long as substantive rights are preserved.

Professor Bernard Currie in his paper *Unification of the Civil Admiralty Rules: Why and How,* 17 U. of Maine L. Rev. 1, 8 (1965) regarding these remedies noted that:

> "Because the rules relating to *these remedies grow out of a body of distinctive substantive law* and out of the exigencies of maritime commerce, they should be preserved. . . . The action *in rem* gives meaning to the maritime lien and the substantive rights associated with it." (emphasis added)

In *Merchants National Bank of Mobile* v. *Dredge General G.L. Gillespie,* 663 F. 2d 1338, 1350 (5 Cir. 1981) cert. dism. 456 U.S. 985 (1982), an extensive examination of *in rem* rights was necessitated within a constitutional challenge to *in rem* arrest, wherein it was noted:

> "*A maritime lien represents a property interest entirely distinct from an in personam right.* 'An action in admiralty to enforce a maritime lien is not an action against any particular person to compel him to do or to forebear anything; it is an action *in rem* asserting against the world the claim of a plaintiff of an offending ship. *It is a real action to enforce a real right*'. E. Biele, *Maritime Liens Arising Out of Collision,* 51 Tulane L. Rev. 1134, 1134 (1977)" (emphasis added).

Similarly, The Fourth Circuit in *Amstar Corp.* v. *S/S Alexandros T.*, 664 F. 2d 904, 908-9 (4 Cir. 1981) within the same type of examination, stated:

> "Quite different from a common law lien, a maritime lien is not simply a security device to be foreclosed if the owner defaults. The vessel itself is viewed as the obligor whether or not the owner is also obligated. *Substantive maritime law confers on the holder of a maritime lien a sufficient interest in the vessel to detain it for security and ultimately to subject it to condemnation and sale for satisfaction of the lien.* The arrest of the vessel in the proceeding *in rem* is to accomplish this end. 'The lien and the proceeding *in rem* are, therefore, correlative—*where one exists, the other can be taken, and not otherwise.*'
>
> These principles were developed to meet the special needs of persons engaged in many aspects of maritime commerce. By enforcing maritime liens through the arrest of vessels in *in rem* proceedings, admiralty enables people engaged in maritime commerce to obtain redress for certain kinds of injuries caused by the vessel and its crew without seeking compensation abroad from the vessel's owner. The owner, moreover, is not exposed to unlimited liability."
>
> (emphasis added)

Contrary to the government's argument the distinction between an *in rem* remedy and an *in personam* remedy are not mere distinctions about the form in which jurisdiction is asserted. It is not the form of the remedy that we are concerned with herein, but the essence. Thus when two such remedies coexist, as they would otherwise in this case, and one of those remedies is transformed into the other, it cannot be disputed that one of the remedies has in fact been abolished. Accordingly, this court is not faced with the question of whether or not elements of the Admiralty practice can be modified but whether a remedy can be removed, thereby causing a substantive right to be lost.

This Court was confronted with a similar problem in *Panama R.R. Co.* v. *Johnson*, 264 U.S. 375, 389-390 (1924) and solved the problem by holding:

> "But it is insisted that even if the statute brings those rules into that law, *it is still invalid in that it restricts the enforcement of rights founded on them to actions at law, and thereby encroaches on the admiralty jurisdiction intended by the Constitution.* It must be conceded that *the construction thus sought to be put on the statute finds support in some of its words,* and also that if it be so construed *a grave question will arise respecting its constitutional validity.* But, as this Court often has held 'a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score.'
>
> * * * *
>
> *It therefore is reasonable to believe that, had Congress intended by this statute to withdraw rights of action founded on the new rules from the admiralty jurisdiction and to make them cognizable only on the common-law side of the courts, it would have expressed that intention in terms befitting such a pronounced departure,*—that is to say, in terms unmistakably manifesting a purpose to make the resort to common-law remedies compulsory, and not merely permissible." (emphasis added)

This Court went on to permit the filing of such actions either in Admiralty or on the common-law side as an election of rights, thereby avoiding the Constitutional problem. Contrary to the governments position, *Panama R.R.* does confront the very boundaries of the Admiralty Law, and is the only case to do so.

Criticism of the FSIA for removal of substantive rights is eloquently made by Prof. A.N. Yiannopoulos in a comprehensive law review article entitled *Foreign Sovereign Immunity and the Arrest of State owned ships: The Need for an Admiralty*

Foreign Immunity Act, 57 Tulane L.R. 1274 (1983), wherein he states:

> "The FSIA, like the British Act, is a comprehensive statute that has resolved a number of important questions concerning the sovereign immunity of a foreign state. Its greatest achievement is the establishment of procedures for obtaining *in personam* jurisdiction against a foreign state and for the execution of judgments that were unavailable under the prior law. However, *many questions remain unresolved, and key terms in the FSIA remain undefined.* A court has aptly observed that the FSIA is "a vaguely-worded statute . . . *a law described by its draftsmen as providing only 'very modest guidance' on issues of preeminent importance.'* " One may sympathize.
>
> "The FSIA was primarily conceived as a vehicle for the enforcement of non-maritime claims. *The inclusion of subsection 1605 (b) and of other provisions relating to the enforcement of maritime claims appear to have been an afterthought.* Be this as it may, maritime claims that are not supported by a maritime lien may be enforced under the procedure of subsection 1605 (a), and maritime claims that are supported by a maritime lien by the procedure of either 1605 (a) or 1605 (b). *This dichotomy is unnatural and its applications may lead to incongruous results.*
>
> "The FSIA has been said to be 'of great benefit to the admiralty bar because it has established, for the first time in the United States, procedures for the enforcement of a maritime claim against a foreign state by an action *in personam*. Additionally, the FSIA is beneficial for the admiralty bar because it permits enforcement of a maritime claim that gives rise to a maritime lien by a simplified procedure without the risks inherent in an actual seizure. However, the *FSIA has, perhaps unnecessarily, deprived litigants of the in rem remedy that they had in certain circum-*

> *stances under the prior law.* This result is particularly troublesome when one thinks of the unavailability of a proceeding *in rem* for the resolution of disputes concerning the ownership or possession of a vessel or the foreclosure of a preferred ship mortgage." (emphasis added)

This, of course, is the precise point that has been put forward in this matter, that regarding certain situations, such as this case, the FSIA is not well thought out, and has the unfortunate effect of taking away rights unnecessarily. Continuing on, Prof. Yiannopoulos concludes:

> *Moreover, the provisions of the FSIA have not been coordinated with prior admiralty law, and the mere intent to preempt such law does not suffice for the resolution of problems. For example, it is uncertain whether the FSIA has abrogated any substantive law or whether it has affected the subject matter jurisdiction of federal courts in admiralty cases.* (p. 1340-42)

The point sought to be made, that the FSIA deprives maritime plaintiff of substantive rights, is not unique, but is in fact a point that deserves serious consideration, and that the Courts will have to confront sooner or later.

England avoided this problem in its State Immunity Act, 6A *Benedict on Admiralty*, p. 8-72 (7th ed. 1983), as it preserved the *in rem* action for commercial matters but created a procedure to convert *in rem* to *in personam* for matters where sovereign immunity would have otherwise applied. Thus the English procedure conforms to international practice, leaving the United States as the only major western nation which would prevent property owned by a state and used for commercial purposes from being arrested. We have thus managed to throw the baby out with the bath water, and Congress has failed in its intent to make United States law on sovereign immunity consistent with international law. See *McKeel* v. *Islamic Republic*

of Iran, 722 F.2d 582, 587 (9 Cir. 1983); *Texas Trading & Milling Corp.* v. *Federal Republic of Nigeria*, 647 F.2d 300, 310 (2 Cir. 1981) *cert. den.* 454 U.S. 1148 (1982); H.R. Rep. No. 1487, 94th Cong., 2d Sess. 7; (1976) U.S. Code Cong. & Ad. News 6605-6.

2. By footnote the government takes the position that unconsented suits against foreign sovereigns were not permitted in admiralty at the time of the adoption of the Constitution. (Gov. 4, n. 2). A careful examination of the state of the law prior to 1926 does not support that position. Lord Denning, the Master of the Rolls, stated the proposition powerfully in the Court of Appeal decision of *The "I Congreso Del Partido"* [1980] 1 Lloyd's L. Rep. 23, 29 (C.A. 1979):

> That doctrine about warships was wrongly extended in *The Porto Alexandre*, (1919) 1 Ll.L. Rep. 191 to state trading vessels. *But now that that case is no longer law, I am of opinion that we can go back to the law as stated by that great international lawyer Sir Robert Phillimore over 100 years ago in the Charkieh*, (1873) L.R. 4 A.&E. 59. That vessel was owned by the Khedive of Egypt. *She was used as an ordinary merchant trading vessel.* She was in collision in the Thames. Sir Robert said (at page 99):
>
> > '. . . *No principle of international law, and no decided case, and no dictum of jurists of which I am aware,* has gone so far as to authorize a sovereign prince to assume the character of a trader, when it is for his benefit; and when he incurs an obligation to a private subject to throw off, so to speak, his disguise, and appear as a sovereign, claiming for his own benefit, and to the injury of a private person, for the first time, all the attributes of his character; . . . (emphasis added).

Thus, *The Pesaro* 271 U.S. 562 (1926) must be recognized as a judicial orphan which created an unsupportable injustice,

circumvented by the device of the Tate Letter (26 Dept. State Bull. 984 [1952], 425 U.S. 711-716) so that the "Department of State . . . should no longer be embarrassed by having the decision in *The Pesaro* remain unquestioned . . ." [*Mexico* v. *Hoffman*, 324 U.S. 30, 40 (1945)]. Most certainly it can not provide support for the statement, as it regards state owned merchant ships that such ships have enjoyed 150 years of immunity. See *Bank of the U.S.* v. *Planter's Bank of Georgia*, 23 U.S. (9 Wheat.) 904, 908 (1824); *The Fidelity*, 8 Fed. Cas. 1189, 1191-2, No. 4758 (CC, SDNY 1879); *U.S.* v. *Wilder*, 28 Fed. Cas. 601, 604, No. 16, 694 (CC Ma, 1838); *The Charkieh*, (1873) L.R. 4 A.&E. 59. Accordingly, it must be concluded that there was a substantive right of *in rem* arrest of state-owned merchant ships under Article III when the Constitution was adopted in 1789, contrary to the court below's findings.

3. Reference is made by the government (Gov. 4) to the testimony of one Michael M. Cohen, apparently to confer the blessing of the Admiralty Bar upon the FSIA. Indeed he testified concerning the FSIA while he was Chairman of the Committee on Maritime Legislation of the Maritime Law Association of the United States (MLA), but that was as an individual, not on behalf of the MLA. Such testimony went unreported to the MLA, and the only indication given by him to the MLA concerning his involvement was that there would be a resolution for the MLA to consider. See MLA Documents 597 dated May 7, 1976, pp. 6516 and 599 dated October 29, 1976, p. 6580. No resolution *or* consideration was ever offered to the MLA, since the FSIA became law on October 21, 1976. While the circumstances of his testimony before Congress gives the appearance of MLA approval, the reality is that the MLA never actually had the opportunity to comment upon the legislation prior to its passage—an opportunity which it usually has with all maritime related legislation. The confusion that Mr. Cohen's appearance before Congress created, directly or indirectly, resulted in the adoption of a new by-law of the MLA which requires members to present only personal views unless authorized

by the MLA. See MLA Document 634, dated May 1, 1980, pp. 273-6.

4. The Government claims that the Second Circuit's decision is *S & S Machinery Co.* v. *Masinexportimport*, 706 F.2d 411, 417-18 (2 Cir. 1983) *cert. den.* 104 S.Ct. 161 (1983) disposes of the argument concerning waiver, when in fact that decision relies upon the phrase "other liability" which is not in issue in this matter, since our point concerns the term "suits against property" (which was not mentioned in that treaty, but is in this one). The government can be expected to argue for such restrictive reading of the statute, but has lost this same argument concerning its own ships. See *The Lake Monroe*, 250 U.S. 246 (1919) wherein *in rem* arrest was permitted of government owned merchant vessels since the applicable statute made them "subject to all laws, regulations and liabilities governing merchant vessels . . ." (250 U.S. at 250-1), as does the Treaty of Friendship, Commerce and Navigation with Italy, [1949] 63 Stat. 2255, T.I.A.S. #1965, 79 UNTS 171.

Conclusion

Whenever the government tells us that they are merely modifying a right under the Constitution, this Court should examine the issue with careful scrutiny, if not skepticism. The framers of the Constitution did not provide for Admiralty jurisdiction under Article III on a mere whim. The problems with Admiralty under the Colonial Vice-Admiralty Courts, and later under the State Courts during the Articles of Confederation (see *Robertson, Admiralty & Federalism,* 1970, pages 65-103) compelled the need for Constitutional boundaries of Admiralty Law, which this Court should not disturb. Accordingly, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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